

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re DYNAMIC RANDOM ACCESS  
MEMORY (DRAM) ANTITRUST  
LITIGATION

No. M 02-1486 PJH

This Document Relates to:

State of New York v. Micron et al.  
(C 06-6436 PJH)

**ORDER GRANTING IN PART  
AND DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS**

Defendants' motion to dismiss plaintiff's complaint came on for hearing before this court on February 7, 2007. Plaintiff, the State of New York acting through its Attorney General, appeared through its counsel, Jeremy R. Kasha and Richard L. Schwartz. Defendants appeared through their counsel, Julian Brew, Ronald C. Redcay, Joel S. Sanders, Peter Nemerovski, Kenneth R. O'Rourke, Harrison J. Frahn, Gary L. Halling, and Robert B. Pringle. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS defendants' motion to dismiss in part and DENIES the motion to dismiss in part, for the reasons stated at the hearing, and as follows.

**BACKGROUND**

The instant case is part of a broader antitrust MDL action currently pending before the court. Plaintiff, the State of New York, like various other plaintiffs in the MDL action, generally alleges a horizontal price-fixing conspiracy in the U.S. DRAM market for dynamic random access memory ("DRAM"), carried out by numerous manufacturer defendants.<sup>1</sup>

<sup>1</sup> The named defendants are: Micron Technology, Inc.; Micron Semiconductor Products, Inc.; Infineon Technologies AG; Infineon Technologies North America Corp.; Hynix Semiconductor, Inc.; Hynix Semiconductor America, Inc.; Samsung Electronics Co., Ltd;

1           A.       Background Allegations and Claims

2           Plaintiff's complaint alleges that beginning in 1999, defendants entered into a  
 3 "secret, worldwide conspiracy designed to eliminate competition" in the U.S. market for  
 4 DRAM. See Complaint at ¶ 2. Defendants did so by allegedly coordinating the prices they  
 5 charged to large computer manufacturers ("OEM"s) and other customers. Id. Plaintiff  
 6 alleges that, over a period of three years, defendants engaged in hundreds, if not  
 7 thousands, of pricing communications, in order to succeed in their principal objective to  
 8 control and artificially raise DRAM prices. Id. As a result, plaintiff alleges that consumers  
 9 of computers and other digital devices paid more for DRAM, or purchased less of it, than  
 10 they would have in a competitive market. Id.

11           Plaintiff contends that defendants' conspiracy caused "enormous damage to users of  
 12 DRAM-containing products and DRAM memory chips." Complaint at ¶ 5. Among those  
 13 damaged, according to plaintiff, were New York residents, businesses, schools and  
 14 government entities, all of whom purchased significant quantities of products containing  
 15 price-fixed DRAM chips. Id. To that end, plaintiff State of New York brings the instant  
 16 action in its own proprietary capacity, and as parens patriae and as authorized by law on  
 17 behalf of its consumers – both natural persons and entities. See Complaint, ¶ 10.  
 18 Specifically, plaintiff brings this action on behalf of: (a) "state and local government  
 19 branches, departments, agencies, subdivisions and other entities" ("government entities")  
 20 that purchased DRAM or DRAM products from defendants *directly or indirectly*; and (b)  
 21 natural persons in New York who purchased DRAM or DRAM products from defendants  
 22 *indirectly*. See id.

23           Plaintiff's complaint, which was filed on July 13, 2006, asserts four causes of action  
 24 against defendants: (1) a federal antitrust claim for violation of Section 1 of the Sherman  
 25 Act; (2) a state antitrust claim for violation of New York's Donnelly Act; (3) a claim pursuant

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 27 Samsung Semiconductor, Inc.; Mosel Vitelic Corp.; Mosel Vitelic, Inc.; Nanya Technology  
 28 Corporation; Nanya Technology Corporation USA, Inc.; Elpida Memory, Inc.; Elpida Memory  
 (USA), Inc.; and NEC Electronics America, Inc. (collectively "defendants").

to New York's Executive Law § 63(12), which allows the State Attorney General to enjoin "fraudulent or illegal acts" in the "carrying on, conducting or transaction of business"; and (4) a claim pursuant to California's state antitrust statute, the Cartwright Act. See, e.g., Complaint at ¶¶ 81-86, 87-92, 93-95, 96-101.

#### B. The Instant Motion

Defendants seek dismissal in part of plaintiff's first and second causes of action, and dismissal of plaintiff's third and fourth causes of action in their entirety.<sup>2</sup> In particular, defendants seek dismissal of (1) the Sherman Act claim to the extent it is based on indirect purchases and seeks recovery on behalf of unnamed government entities; (2) New York's claim for a civil penalty under the Donnelly Act; (3) claims under New York's Executive Law § 63(12); and (4) New York's Cartwright Act claim.

### DISCUSSION

#### A. Legal Standard

In evaluating a motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. See, e.g., Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)(citations omitted). In order to survive a dismissal motion, however, a plaintiff must allege facts that are enough to raise his/her right to relief "above the speculative level." See Bell Atlantic Corp. v. Twombly, --- U.S. ---, 127 S. Ct. 1955, 1964-65 (2007). While the complaint "does not need detailed factual allegations," it is nonetheless "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' [which] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id.

In short, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face," not just conceivable. Twombly, 127 S. Ct. at 1974.

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<sup>2</sup> Defendants have also filed a motion to dismiss similar claims alleged in a separate but related case brought by forty other plaintiff States acting through their Attorneys General. See State of California et al. v. Infineon Technologies AG, et al., case no. C 06-4333 PJH. The merits of that motion are discussed by way of a separate order, filed concurrently herewith.

B. Sherman Act Claim

Defendants raise two issues regarding plaintiff's first claim for relief under the Sherman Act. First, defendants argue that plaintiff's complaint impermissibly seeks damages for injuries sustained by indirect purchasers, in violation of the federal Illinois Brick doctrine. See Mot. at 3:1-10; Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Second, defendants contend that plaintiff also impermissibly asserts claims on behalf of state and local government entities. Defendants contend, therefore, that all claims brought on behalf of indirect purchasers or government entities, must be dismissed.

1. indirect purchaser claims

Defendants rely on paragraphs 10 and 86 of plaintiff's complaint in order to make their point. Paragraph 86, which sets forth plaintiff's Sherman Act claim, alleges that "the State is entitled to recover treble damages, *based on the injury that the State Entities suffered* as a result of Defendants' illegal conduct" (emphasis added). The phrase "State Entities" is in turn defined in paragraph 10 to include all state and local government entities who purchased DRAM or DRAM products "directly or indirectly" from defendants (emphasis added). Defendants argue that, reading these allegations together, it is undisputed that plaintiff's Sherman Act claim seeks recovery, at least in part, for injuries suffered by indirect purchasers – something that Illinois Brick prohibits. Plaintiff concedes that Illinois Brick does not allow for recovery of indirect purchaser injuries, but states that its Sherman Act claim "is brought solely on behalf of the State and other non-State public entities that are direct purchasers." See Opp. Br. at 3:18-19.<sup>3</sup>

Defendants' argument is valid. A logical reading of the allegations contained in plaintiff's complaint – and specifically paragraph 86, as modified by paragraph 10 – does suggest that plaintiff is seeking damages based in part, on indirect purchases made by

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<sup>3</sup> Plaintiff contends that direct purchaser status is given to it and to other government entities by operation of an assignment clause contained in a Centralized Contract between one of plaintiff's state agencies and certain OEMs, as well as by operation of the "control exception" to Illinois Brick. See 431 U.S. at 736 n. 16 (exception to indirect purchaser prohibition might apply "where the direct purchaser is owned or controlled by its customer").

government entities. Notwithstanding the fact that plaintiff concedes that it can only proceed as to direct purchaser claims, and its avowal that it seeks to do so, the allegations of plaintiff's complaint indicate otherwise. To the extent the complaint states as much, therefore, these indirect purchaser claims are barred pursuant to Illinois Brick's well-established prohibition on such claims.

Accordingly, the court hereby DISMISSES all claims brought pursuant to the Sherman Act that seek recovery on behalf of indirect purchasers, to the extent such claims are pled in paragraphs 86 and 10 of the complaint.

## 2. government entities

Even once all claims brought under the Sherman Act are whittled down to direct purchaser claims, defendants challenge plaintiff's ability to assert such claims on behalf of other government entities (i.e., "state and local government branches, departments, agencies, subdivisions and other entities"). See Complaint at ¶¶ 10, 86. Defendants argue that such representative claims are barred here, as neither federal nor state statute authorizes representative claims for damages. Plaintiff, for its part, contends that its' representative claims are permissible for two reasons: first, because all government entities here have expressly assigned their antitrust claims to plaintiff State of New York, thereby giving plaintiff standing to assert claims on their behalf. Second, plaintiff argues that New York statutory authority does permit plaintiff's Sherman Act claim on behalf of government entities.

Generally speaking, a state and its political subdivisions are considered "persons" for purposes of securing treble damages under the Sherman Act pursuant to section 4 of the Clayton Act. See, e.g., Hawaii v. Standard Oil Co., 405 U.S. 251, 260-61 (1972); 15 U.S.C. § 15. As such, these government entities may bring suits for monetary damages, and most often do, in their proprietary capacities. See, e.g., Standard Oil Co. of California v. Arizona, 738 F.2d 1021, 1023 (9th Cir. 1984) ("it is well established that states are "persons" capable of bringing treble damage actions under the Sherman and Clayton Acts).

1 Here, however, while plaintiff State of New York does bring suit in its own name and in its  
2 proprietary capacity, it also asserts claims on behalf of other government entities. See  
3 Complaint at ¶¶ 10, 86. Normally, a plaintiff state might assert such a representative claim  
4 by bringing a class action on behalf of the other government entities. See Fed. R. Civ.  
5 Proc. 23. Plaintiff has not alleged a class action. As such, the issue for the court is  
6 whether plaintiff nonetheless has the authority to assert a representative claim on behalf of  
7 government entities.

8 Preliminarily, defendants are correct that the federal Clayton Act does not permit  
9 representative claims on behalf of other government entities. See 15 U.S.C. § 15. The  
10 Clayton Act *does* allow a state attorney general to bring a parens patriae claim on behalf of  
11 natural persons, but that provision expressly limits parens patriae actions to those brought  
12 on behalf of natural persons, and does not include corporations, partnerships, or  
13 proprietorships. See id. at § 15c(a)(1). By extension, government entities are similarly  
14 excluded from the definition of natural person.

15 Since the Clayton Act does not grant plaintiff standing to sue on behalf of the  
16 government entities alleged in the complaint, the question is whether any other source of  
17 law grants the standing sought. Or more specifically, the question is whether New York  
18 state law provides standing. For as the Ninth Circuit has stated, “in determining whether a  
19 state has standing to sue on behalf of its constituent units under the federal antitrust laws,  
20 the federal court must look to the applicable state law.” See, e.g., Alaska v. Chevron, 669  
21 F.2d 1299, 1302 (9th Cir. 1982)(holding that where state of Alaska would permit its attorney  
22 general to bring antitrust action on behalf of state university and state university would have  
23 direct purchaser standing, state of Alaska could sue as direct purchaser on behalf of state  
24 university). Although the Chevron case involved the state’s right to sue on behalf of a state  
25 entity only, and not on behalf of non-State public entities such as the local government  
26 entities alleged here, see, e.g., Complaint at ¶ 10, Chevron’s reasoning is nonetheless  
27 applicable. As such, if plaintiff can demonstrate that applicable New York law grants it  
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1 standing to sue on behalf of other government entities, it will have standing here.

2 Plaintiff attempts to prove that standing exists by virtue of (1) certain assignment  
3 clauses contained in various contracts entered into by the government entities in question;  
4 and (2) New York statutory authority.

5 With respect to the former, plaintiff alleges that the government entities in question  
6 generally made purchases of DRAM-containing products from OEMs, who in turn  
7 purchased DRAM directly from defendants. See Complaint at ¶ 72. However, many  
8 government entities made their purchases from OEMs pursuant to a Centralized Contract  
9 entered into by the State of New York's Office of General Services ("OGS"), and the OEMs.  
10 Id. at ¶ 73. Plaintiff alleges that the government entities' purchase of DRAM-containing  
11 products – specifically, computers – from OEMs actually qualify as *direct* purchases of  
12 DRAM from defendants, because the Centralized Contract contains an assignment clause  
13 that reads: "the "Contractor hereby assigns to the State any and all its claims ... which may  
14 arise under the antitrust laws of the United States ... and the antitrust laws of the State of  
15 New York....". See id. at ¶¶ 74-75. Plaintiff here argues that, by virtue of this assignment  
16 clause, each government entity has assigned its direct purchaser claims to the State of  
17 New York, thereby granting plaintiff standing to sue on their behalf.

18 This argument is problematic. To begin with, plaintiff has not cited to any legal  
19 authority establishing that assignment of a federal antitrust claim from government entities  
20 to the State of New York confers standing on plaintiff to bring a representative suit for  
21 damages under the Clayton Act. But see Com. of Pa. v. Milk Industry Management Corp.,  
22 812 F. Supp. 500 (E.D. Pa. 1992)(school district's assignment of its antitrust cause of  
23 action to Pennsylvania's Attorney General gave Pennsylvania standing to maintain *parens*  
24 *patriae* action on behalf of state entity against dairies for alleged bid-rigging). Even  
25 assuming, however, that a contractual assignment of rights *can* convey standing to sue, the  
26 fact remains that plaintiff has not demonstrated that any valid assignment has taken place  
27 between appropriate parties. Under the terms of the assignment clause in the Centralized  
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Contract, it is the “contractor” who assigns all antitrust claims to the state of New York. See NY AG Complaint, ¶ 75. But, as alleged in the complaint, it is the *OEMs* who are the contracting parties. See id. at ¶¶ 73-75. In other words, it is the *OEMs* who have assigned their claims to the State of New York, *not* the government entities on whose behalf plaintiff purports to sue. This makes sense, since it is the *OEMs* who are alleged to have purchased DRAM directly from defendants. It also, however, means that plaintiff’s assertion that government entities have assigned direct purchaser claims to it via the assignment clause, is wrong.<sup>4</sup> As such, the court concludes that plaintiff’s representative claim brought on behalf of government entities, if it is to go forward, cannot be rooted in the Centralized Contract’s assignment clause.

The question remains whether plaintiff’s representative claim can go forward based upon New York statutory law. Plaintiff argues that the State Attorney General has the express authority to bring suit on behalf of government entities pursuant to N.Y. Gen. Bus. Law § § 340-347 et seq. (the “Donnelly Act”), and N.Y. Executive Law §§ 63(1) and 63-c(1). Defendants, however, challenge plaintiff’s reliance on either state statute, arguing that no provision allows the state to sue on behalf of *unnamed* government entities.

Defendants have the better argument. The Donnelly Act does, as plaintiff notes, give the State Attorney General the right to bring an action “on behalf of any political subdivision or public authority of the state... to recover damages provided for by federal law for violations of the federal antitrust laws...”. See N.Y. Gen. Bus. Law § 342-b. However, the text of this provision also states that the action is to be brought “upon the request of such political subdivision or public authority.” See id. And as defendants point out, there is

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<sup>4</sup> Plaintiff also alleges that other individual contracts were entered into between OGS and *OEMs* pursuant to the Centralized Contract, and that many government entities therefore made their DRAM-containing purchases from *OEMs* “with the Centralized Contract as a framework.” See Complaint at ¶¶ 76-79. These allegations cannot save plaintiff’s argument, however, since plaintiff nowhere alleges that the government entities were themselves ever assigned any direct purchaser claims by the *OEMs*, let alone that the government entities in turn assigned those claims to plaintiff State of New York. Without this nexus alleged, plaintiff cannot establish that it is a direct purchaser standing in the shoes of the government entities.



1 no allegation in the present complaint stating either that the government entities at issue  
2 have requested that the present action be instituted on their behalf, or that even identify the  
3 entities at issue.

4 New York v. Cedar Park Concrete Corp., 665 F. Supp. 238, 241-42 (S.D. N.Y.  
5 1987), is remarkably on point, and proves instructive. There, the court considered the  
6 same issue – i.e., whether the state could properly represent government entities in an  
7 antitrust action seeking treble damages pursuant to the Clayton Act, where the state also  
8 sought damages for violation of the Donnelly Act. See id. As here, no class action was  
9 pled, and the court looked to state statutes to see if a representative suit was authorized.  
10 In construing the same Donnelly Act provision that plaintiff cites to this court, the Cedar  
11 Park Concrete court held that a predicate had to be established in order to prove that the  
12 State Attorney General had been “requested” to act on behalf of the state entities. While  
13 the court found that a sufficient predicate had been established with respect to one state  
14 entity, the court found that the “other state subdivisions on whose behalf the state of New  
15 York sues .. are not named in the complaints” and that “in view of the need early in the  
16 litigation to identify state-affiliated purchasers, we believe the complaints should be  
17 dismissed insofar as they purport to state treble damages claims on behalf of unidentified  
18 state subdivisions.” Id. at 242.

19 The court adopts this reasoning here. As such, plaintiff’s failure to allege either that  
20 the government entities in question requested that plaintiff bring suit on their behalf, or to  
21 name or identify the government entities in question, means that plaintiff’s representative  
22 claim on behalf of those government entities must be dismissed insofar as the Donnelly Act  
23 is concerned.

24 Plaintiff’s arguments with respect to New York Executive Law §§ 63(1) and 63-c(1)  
25 fare no better. Although it is true that the first of these provisions, for example, does  
26 provide statutory authority for the State Attorney General to prosecute and defend “all  
27 actions and proceedings in which the state is interested,” it nowhere mentions suit on  
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1 behalf of government entities, let alone authorizes representative actions on behalf of the  
 2 government entities on whose behalf plaintiff sues here. See, e.g., Complaint at ¶ 10  
 3 (defining “State Entities” as “all state and local government branches, departments,  
 4 agencies, subdivisions and other entities...”)(emphasis added). As for N.Y. Executive Law  
 5 § 63-c(1), it specifically states that the State Attorney General’s enforcement is limited to  
 6 violations of the section itself, which allows the Attorney General to bring a claim wherever  
 7 state or local government entities have had public funds or property unlawfully converted or  
 8 appropriated. See N.Y. Exec. Law § 63-c(1)(“The attorney-general shall commence an  
 9 action, suit or other judicial proceeding, *as prescribed in this section*, whenever he deems it  
 10 for the interests of the state so to do...”)(emphasis added). Here, plaintiff has not actually  
 11 alleged any cause of action pursuant to this law.

12 In sum, the court concludes that plaintiff has provided no legal authority expressly  
 13 authorizing plaintiff’s representative claim under the Sherman Act on behalf of the unnamed  
 14 government entities alleged in plaintiff’s complaint. As such, plaintiff’s claims in this regard  
 15 must be, and are, hereby DISMISSED. Leave to amend is granted, however, in order to  
 16 allow plaintiff to cure the deficiencies noted herein with respect to the requisite showing that  
 17 must be made pursuant to the Donnelly Act’s authorization for representative claims on  
 18 behalf of state government entities. The court also notes that, given the general ambiguity  
 19 in plaintiff’s complaint as to the specific entities on whose behalf plaintiff brings suit, and the  
 20 direct or indirect nature of those entities’ DRAM purchases, plaintiff must allege in any  
 21 future amendment, the nature of the purchases made by specific government entities. This  
 22 will enable the court to determine with specificity the purchases and entities upon which  
 23 plaintiff’s representative claims are stated.

#### 24 C. Donnelly Act Claim

25 Defendants also challenge plaintiff’s second claim for relief, which is brought  
 26 pursuant to New York’s antitrust statute, the Donnelly Act. See N.Y. Gen. Bus. Law § 342  
 27 et seq. Plaintiff’s Donnelly Act claim alleges that plaintiff is entitled to recover damages “on  
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1 behalf of all State Entities” that purchased DRAM/DRAM products directly or indirectly from  
 2 defendants, and “on behalf of all natural persons in New York” who purchased  
 3 DRAM/DRAM products indirectly from defendants. See Complaint at ¶ 92. Plaintiff  
 4 furthermore alleges that it, “in its sovereign capacity, is also entitled to recover civil  
 5 penalties” pursuant to the Donnelly Act, and injunctive relief. Id.

6 Defendants challenge plaintiff’s claim on three grounds: (1) that plaintiff may not  
 7 bring a Donnelly Act claim on behalf of unnamed and unidentified governmental entities; (2)  
 8 that plaintiff may not bring a Donnelly Act claim that seeks damages on behalf of natural  
 9 persons; and (3) that plaintiff may not recover civil penalties under the Act.

10 1. unnamed government entities

11 Defendants’ argument that plaintiff may not bring a claim under the Donnelly Act on  
 12 behalf of unnamed entities, and plaintiff’s arguments to the contrary, have already been  
 13 discussed above in connection with plaintiff’s ability to file a representative claim on behalf  
 14 of these entities under the Sherman Act.

15 The same analysis that applied there, applies here. In sum, while the Donnelly Act  
 16 does provide express statutory authority for the State Attorney General to sue on behalf of  
 17 “any political subdivision or public authority of the state,” the Donnelly Act contemplates  
 18 that these government entities must be specifically identified, and it must affirmatively be  
 19 demonstrated that they have “requested” that the Attorney General bring suit on their  
 20 behalf. See N.Y. Gen. Bus. Law § 342-b (“the [A]ttorney [G]eneral may also bring action  
 21 on behalf of any political subdivision or public authority of the state upon the request of  
 22 such political subdivision or public authority to recover damages for violations of section  
 23 three hundred forty of this article...”); New York v. Cedar Park Concrete Corp., 665 F.  
 24 Supp. 238, 241-42 (S.D. N.Y. 1987). Since, as noted above, the government entities on  
 25 whose behalf plaintiff sues here are not identified in the complaint, nor is it alleged that they  
 26 have requested the Attorney General’s representation, plaintiff’s Donnelly Act claim on their  
 27 behalf is DISMISSED.

1 As noted above, however, plaintiff is granted leave to amend in order to properly  
2 name and identify the entities on whose behalf it brings suit. And as required above,  
3 plaintiff's indirect or direct purchaser status must be provided.

4 2. damages on behalf of natural persons

5 Defendants argue that the Donnelly Act does not permit the Attorney General to  
6 assert a damages claim on behalf of natural persons. Plaintiff responds that the Attorney  
7 General's authority to do so is grounded in two sources: its common law *parens patriae*  
8 powers, and statutory law.

9 Preliminarily, and beginning first with the provisions of the Donnelly Act, the court  
10 notes that defendants are correct in arguing that the Act itself does not authorize the  
11 Attorney General to pursue damages claims on behalf of natural persons. To be sure, the  
12 Act *does* contemplate that the Attorney General may file claims "in behalf of the people of  
13 the state...". See N.Y. Gen. Bus. Law § 342. However, the Act specifically limits such  
14 claims to those seeking injunctive relief, or civil penalties under the Act. See id. at § 342-a.  
15 By contrast, the separate provision of the Act that expressly governs the Attorney General's  
16 ability to pursue *damages* claims under the Act, unambiguously limits such actions to those  
17 "on behalf of any political subdivision or public authority of the state." See id. at § 342-b.  
18 Presumably, the legislature knew how to include language granting the Attorney General  
19 the right to sue "in behalf of the people of the state" in the Act's damages relief provision,  
20 as it did so with respect to the provisions allowing actions for injunctive relief and civil  
21 penalties. Accordingly, the court concludes that the legislature's failure to include similar  
22 language in the provision authorizing damages suits was deliberate. As such, plaintiff may  
23 not assert a claim for monetary damages under the Act on behalf of natural persons.

24 Plaintiff argues that the Attorney General's authority to bring such claims can  
25 nonetheless be grounded in either common law, or other statutory law. Ultimately, the  
26 court is unpersuaded as to either ground.

27 The argument that the Attorney General has common law authority to bring  
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monetary damages claims on behalf of natural persons (i.e., parens patriae authority) has been discussed in detail, in connection with the court's related order on defendants' motion to dismiss the claims filed by various other State Attorneys General. See Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, State of California, et al. v. Infineon Technologies AG, et al., C 06-4333 PJH (filed concurrently herewith, and incorporated by reference). As the court states therein, there is no broadly recognized common law parens patriae right to pursue monetary damages claims, and cases discussing the common law parens patriae right have generally been limited to cases seeking injunctive or other equitable relief. See, e.g., Hawaii v. Standard Oil Co., 405 U.S. 251; In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 131 (9th Cir. 1973)(distinguishing availability of parens patriae authority for suits seeking injunctive relief, from suits seeking damages). This being the case, the court looks for the existence of any state law that expressly authorizes a suit by the Attorney General for monetary damages on behalf of natural persons.

Here, plaintiff has not cited any cases that support the proposition that the State Attorney General is vested with parens patriae authority to institute suits for monetary damages. Plaintiff's reliance on In re Insurance Antitrust Litig., which states that a parens patriae action can vindicate its state interest "by obtaining damages and/or an injunction," is inapposite. See, 938 F.2d 919, 927 (9th Cir. 1991), aff'd in part & rev'd in part sub nom. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). First, the language plaintiff relies on is dictum. Second, and more importantly, the court's statement was based directly on its reading of the Supreme Court's language in Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982). The Snapp case, in turn, dealt with a parens patriae claim that sought declaratory and injunctive relief only – *not* damages. Moreover, People ex rel. Spitzer v. Grasso, recently decided by a New York state appellate court, counsels against a finding that the State Attorney General is vested with the authority sought by plaintiff. See 836 N.Y.S.2d 40 (N.Y. App. Div. 2007). There, the court considered whether the Attorney

1 General's common law powers allowed the Attorney General to assert certain non-statutory  
2 causes of action, which the Attorney General sought to allege alongside statutory causes of  
3 action that were authorized by New York's Not-for-Profit-Corporation ("N-PCL") statute.  
4 See id. at 41. In its discussion, the court cited with approval previous state cases that  
5 noted "[w]here the Legislature has not been completely silent but has instead made  
6 express provision for civil remedy, albeit a narrower remedy than the plaintiff might wish,  
7 the court should ordinarily not attempt to fashion a different remedy, with broader  
8 coverage." See id. at 48. To that end, the court ultimately found that, in view of the N-  
9 PCL's many remedial choices, and the N-PCL's failure to even "hint" at the Attorney  
10 General's authority to bring causes of action other than those authorized in the statute, the  
11 Attorney General lacked such authority. Id. at 49-50.

12 The court is persuaded by this reasoning. In sum, in view of the Donnelly Act's  
13 provisions setting forth the various remedies that the Attorney General is entitled to pursue,  
14 none of which includes monetary damages on behalf of natural persons, the court  
15 concludes that authority for such a suit under the Donnelly Act is lacking, and cannot be  
16 premised on the Attorney General's general common law powers.

17 Plaintiff's secondary argument that authority for a *parens patriae* claim seeking  
18 monetary damages may be grounded in New York statutory authority, is similarly flawed.  
19 Plaintiff bases this argument on New York Executive Law § 63(12). This statute does, as  
20 plaintiff contends, authorize the State Attorney General to sue "in the name of the people of  
21 the State of New York" in order to enjoin "repeated fraudulent or illegal acts" or "persistent  
22 fraud or illegality in the carrying on, conducting or transaction of business." See id.  
23 However, while this provision *may* allow the Attorney General to sue on behalf of natural  
24 persons as a result of fraud and illegality (and it is by no means clear that such a suit could  
25 properly seek monetary damages), this is no way suffices to authorize similar Attorney  
26 General actions under the *Donnelly Act*, particularly since the Donnelly Act itself, as noted  
27 above, expressly denies the Attorney General such authority. Moreover, although plaintiff  
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1 relies on In re Cardizem and In re Lorazepam – cases also discussed in connection with  
 2 the various state attorney generals’ motion papers – those cases are not controlling. See  
 3 218 F.R.D. 508 (E.D. Mich. 2003); 205 F.R.D. 386 (D. D.C. 2002). Furthermore, neither  
 4 case specifically discussed the authority of the State Attorney General to sue for *monetary*  
 5 *damages* on behalf of natural persons.

6 In sum, plaintiff has failed to point to any New York authorities that affirmatively vest  
 7 the State Attorney General with authority to assert a *parens patriae* claim for monetary  
 8 damages on behalf of natural persons, pursuant to the Donnelly Act. In view of all the  
 9 above, the court concludes plaintiff’s claim for damages under the Act on behalf of natural  
 10 citizens must be and is accordingly DISMISSED.

### 11 3. civil penalty under Donnelly Act

12 Finally, the parties dispute whether the State Attorney General may properly seek  
 13 civil penalties pursuant to the Donnelly Act. The relevant provision of the Act provides:  
 14 “the attorney-general may bring an action in the name and in behalf of the people of the  
 15 state ... to recover a penalty ... for the doing in this state of any act herein declared to be  
 16 illegal, or any act in, toward or for the making or consummation of any contract, agreement,  
 17 arrangement or combination herein prohibited, wherever the same may have been  
 18 made...”. See N.Y. Gen. Bus. Law § 342-a. Defendants assert that this language plainly  
 19 requires plaintiff to allege either that an illegal contract was entered into in the State of New  
 20 York, or else that some act in New York is or was “preparatory” to the creation of an illegal  
 21 agreement. Plaintiff’s complaint, defendants continue, fails to make any such allegation.  
 22 Plaintiff, in response, contends that its allegations relating to IBM, an OEM “headquartered”  
 23 in New York, are sufficient. See, e.g., Complaint at ¶¶ 38, 45, 47, 50-51, 58.

24 Preliminarily, the court must decide what type of “acts” the relevant provision of the  
 25 Donnelly Act requires plaintiff to allege. Defendants are correct that the plain language of  
 26 the statute permits civil penalties to be recovered for the “doing in this state” of certain  
 27 “acts” – i.e., the doing of certain acts in New York specifically. See N.Y. Gen. Bus. Law §  
 28



1 342-a. Defendants are also correct that under the language of the Act, qualifying acts  
2 might include either entering into the alleged price-fixing conspiracy in New York, or acts of  
3 preparation completed in New York in order to enter into a price-fixing conspiracy  
4 elsewhere. See id. However, contrary to defendants' interpretation, in stating that a  
5 qualifying act may be one that goes "toward or for the making or consummation of any  
6 contract, agreement, arrangement or combination herein prohibited," this court interprets  
7 the Act as requiring only that an act be done in the State of New York that bears on the  
8 defendants' completion of their price-fixing agreement – even if the agreement was entered  
9 into elsewhere. See N.Y. Gen. Bus. Law § 342-a.

10 The question, then, is whether plaintiff's complaint alleges, at a minimum, an act  
11 done in New York, that bears on the consummation of defendants' global price-fixing  
12 conspiracy. In this respect, plaintiff's allegations are sufficient. Plaintiff alleges that "New  
13 York residents, businesses, schools and government entities purchased significant  
14 quantities of products containing price-fixed DRAM chips." See NY AG Complaint, ¶ 5.  
15 Plaintiff also alleges that numerous state entities purchased DRAM from OEMs, including  
16 IBM, and that such purchases are generally in the hundreds of millions of dollars. Id. at ¶¶  
17 72-79. Plaintiff furthermore alleges that natural persons in New York paid higher prices for  
18 DRAM than they would have in a competitive market." See id. at ¶ 91. These allegations  
19 demonstrate that consumers in New York, as well as state entities and businesses, paid  
20 illegally high prices for DRAM. The purchase of a product at an artificial overcharge, is an  
21 act toward the consummation of defendants' price-fixing conspiracy. As such, the court  
22 concludes that plaintiff's allegations sufficiently set forth a basis for a civil penalty pursuant  
23 to New York General Business Law § 342-a.

24 Accordingly, and in view of all the above, the court DENIES defendants' motion to  
25 dismiss plaintiff's Donnelly Act claim, to the extent it seeks a civil penalty pursuant to New  
26 York General Business Law § 342-a.

1 D. Executive Law § 63(12)

2 Defendants argue that plaintiff's claim pursuant to New York Executive Law § 63(12)  
3 is also deficient in several respects: (1) the claim itself is untimely; (2) plaintiff lacks  
4 authority to assert claims on behalf of unnamed government entities; (3) all actions  
5 pursuant to the statute must be filed in New York state courts; and (4) no treble damages  
6 are permissible under the statute.

7 1. untimeliness

8 Defendants contend that plaintiff's claim is subject to a three year statute of  
9 limitations. Specifically, since plaintiff alleges that the claim is premised on statutory  
10 violations under the Sherman and Donnelly Acts, see Complaint at ¶ 94, defendants argue  
11 that the proper statute of limitations is the three year limitations period set forth in N.Y.  
12 C.P.L.R. § 214(2), which governs "liabilities imposed by statute." As such, defendants  
13 assert that the complaint – filed in July 2006 – was untimely, since the conduct alleged  
14 therein ceased in June 2002. Plaintiff, in response, contends its claim pursuant to  
15 Executive Law § 63(12) is governed by a six year statute of limitations rather than the three  
16 year statute, and that even under the three year statute, the limitations period has been  
17 tolled.

18 Beginning first with the applicable statute of limitations period, plaintiff is correct that  
19 the six year limitations period applies, rather than the three year limitations period. It is  
20 undisputed that plaintiff's claim is premised on statutory provisions, and that under N.Y.  
21 C.P.L.R. § 214(2), actions based on statutes are normally subject to a 3 year limitation  
22 period. *However*, plaintiff is correct that New York's highest court has expressly stated that  
23 section 214(2) will nonetheless *not* apply where the statute upon which an action is based  
24 had a common law precedent. See State v. Cortelle Corp., 38 N.Y.2d 83, 87 (N.Y. 1975);  
25 see also Gaidon v. Guardian Life, 750 N.E. 2d 1078, 1092 (N.Y. 2001). Indeed, in Cortelle,  
26 the court considered an identical claim brought pursuant to Executive Law § 63(12), and  
27 held that the six year statute of limitations applied. See 38 N.Y.2d at 88-89. Although  
28

1 Cortelle was premised on a fraud claim, its reasoning applies here, as plaintiff has relied on  
2 case law indicating that, like the fraud claim in Cortelle, an antitrust claim was also  
3 recognized at common law. See Judd v. Harrington, 34 N.E. 790, 791 (N.Y. 1983). In view  
4 of this authority, the court finds that N.Y. C.P.L.R. § 214(2) is inapplicable, and the six year  
5 limitations period provided pursuant to N.Y. C.P.L.R. § 213(1) applies instead.

6 Defendants attempt to avoid this conclusion by noting that antitrust claims for  
7 damages are to be considered differently than antitrust claims in equity, which were the  
8 only type of antitrust claims allowable at common law. Defendants fail to support this  
9 argument with any controlling or persuasive authority, however. Pauk v. Bd. of Trustees,  
10 for example, dealt with the borrowing of state limitations statutes in the context of a federal  
11 section 1983 cause of action, and Hartnett v. N.Y. City Transit Auth. also dealt with an  
12 inapposite law, Labor Law § 27-a(10). See 654 F.2d 856 (2d Cir. 1981); 612 N.Y.S.2d 613  
13 (N.Y. App. Div. 1994).

14 In sum, the court finds that the six year statute of limitations governs here, and  
15 plaintiff's claim is therefore timely. In view of this finding, it is unnecessary for the court to  
16 reach the question whether equitable tolling would nonetheless apply under a 3 year  
17 statute of limitations. Defendants' motion to dismiss this claim on timeliness grounds is  
18 DENIED.

19 2. government entities

20 Defendants once again raise the argument that the State Attorney General is not  
21 authorized to assert representative claims for monetary damages on behalf of government  
22 entities for violations of the federal or state antitrust acts.

23 For the same reasons as discussed above in connection with plaintiff's Sherman Act  
24 and Donnelly Act claims, defendants are correct that Executive Law § 63 does not vest the  
25 State Attorney General with authority to bring representative claims on behalf of unnamed  
26 government entities. Nor do any other statutes provide such authority. As such, plaintiff's  
27 claim on behalf of government entities pursuant to New York's Executive Law § 63(12) is  
28

1 accordingly DISMISSED.

2 3. state court limitation

3 Defendants claim that Executive Law § 63(12) expressly mandates that all actions  
4 “be commenced in New York State Supreme Court.” See N.Y. Exec. Law § 63(12).  
5 Plaintiff acknowledges this, but argues that this court’s authority to hear the claim is based  
6 on its supplemental jurisdiction stemming from the court’s jurisdiction over the federal  
7 Sherman Act claim. Accordingly, claims plaintiff, jurisdiction is conveyed by federal statute,  
8 which supercedes the state statute.

9 Defendants are correct that Executive Law § 63(12) law explicitly states that any  
10 claims brought under it must be commenced in state court. See N.Y. Exec. Law § 63(12);  
11 see also New York v. Gen. Motors Corp., 547 F. Supp. 703, 704 n.2 (D.C. N.Y. 1982).  
12 However, plaintiff is also correct that it may properly assert a federal claim in federal court,  
13 thereby allowing the court to exercise supplemental jurisdiction over plaintiff’s state law  
14 claims. See 28 U.S.C. § 1367 (“the district courts shall have supplemental jurisdiction over  
15 all other claims that are so related to claims in the action within such original jurisdiction  
16 that they form part of the same case or controversy under Article III of the United States  
17 Constitution...”).

18 As such, despite the fact that Executive Law § 63(12) contains a procedural  
19 limitation on the place in which suit may be brought, this court may nonetheless assert  
20 supplemental jurisdiction over the claim. Accordingly, the court hereby DENIES  
21 defendants’ motion to dismiss plaintiff’s claim on this ground.

22 4. treble damages

23 Finally, defendants argue that Executive Law § 63(12) does not provide for treble  
24 damages.

25 Defendants are correct. The statute states that the Attorney General may apply for  
26 “restitution and damages,” along with other forms of relief. See N.Y. Exec. Law § 63(12).  
27 The court declines to read treble damages into the word “damages,” however, both as a  
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1 matter of sound statutory construction, and in view of the fact that the legislature has  
2 elsewhere included treble damages provisions in statutory provisions, thus proving that its  
3 omission from the present statute was intentional. See, e.g., N.Y. Gen. Bus. Law § 340 et  
4 seq. (i.e., the Donnelly Act).

5 Moreover, plaintiff's reliance on supporting case law is misplaced, since the cases  
6 cited by plaintiff did not involve recovery of treble damages pursuant to Executive Law §  
7 63(12), or else did not involve actual discussion of the precise issue before the court.

8 In sum, the court accordingly DISMISSES plaintiff's claim pursuant to Executive Law  
9 § 63(12), to the extent plaintiff alleges recovery of treble damages.

10 E. Cartwright Act Claim

11 Defendants move to dismiss plaintiff's claim under the Cartwright Act, to the extent  
12 that plaintiff seeks recovery on behalf of both government entities, and natural persons.

13 For the same reasons discussed by the court in its related order on defendants'  
14 motion to dismiss in State of California et al., v. Infineon Technologies AG, et al.,  
15 defendants are correct. The Cartwright Act expressly states that only the California  
16 Attorney General may bring suit on behalf of natural persons. Likewise, the Cartwright Act  
17 nowhere allows for non-California Attorneys General to bring a representative action on  
18 behalf of government entities. As such, plaintiff's claim on behalf of natural persons and  
19 entities under the Cartwright Act, is hereby DISMISSED.

20 F. Conclusion

21 For all the foregoing reasons, defendants' motion to dismiss plaintiff's complaint is  
22 GRANTED in part and DENIED in part, as follows:

23 1. With respect to plaintiff's claim brought pursuant to the Sherman Act,  
24 the court hereby DISMISSES all claims seeking recovery on behalf of indirect purchasers,  
25 to the extent such claims are pled in paragraphs 86 and 10 of the complaint. All  
26 representative claims on behalf of unnamed government entities are also DISMISSED,  
27 although leave to amend these claims is granted, as stated herein.  
28

2. With respect to plaintiff's claim pursuant to New York's Donnelly Act, plaintiff's claim on behalf of government entities is DISMISSED, with leave to amend as stated herein. Plaintiff's claim for monetary damages on behalf of natural persons is DISMISSED with prejudice. Defendants' motion to dismiss plaintiff's claim to the extent it seeks a civil penalty, however, is DENIED.

3. With respect to plaintiff's claim brought pursuant to Executive Law § 63(12), defendants' motion to dismiss the claim on timeliness grounds, and on grounds that the claim is barred due to procedural restrictions, is DENIED. Plaintiff's claim on behalf of government entities is DISMISSED with prejudice, as is plaintiff's request for recovery of treble damages.

4. With respect to plaintiff's claim on behalf of natural persons and government entities pursuant to the California Cartwright Act, it is DISMISSED with prejudice.

Leave to amend is permitted *only* as specified herein. Amendment as to additional matters is not permitted without prior leave of court. Any amended complaint shall be filed no later than **October 1, 2007**.

**IT IS SO ORDERED.**

Dated: August 31, 2007



PHYLLIS J. HAMILTON  
United States District Judge